IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:5-2-2002

CORAM

THE HONOURABALE MR.JUSTICE V.KANAGARAJ

W.P.NO.729 OF 1998

Jaychem Products
rep. By its Proprietor
D.Sitaraman,
104 V.M. Street,
Mylapore, Chennai-4. .. petitioner
vs.
1.The D. Regional Director,
Regional Office,
Employees State Insurance Corporation,
143 Sterling Road, Madras-34.

2.The Recovery Officer,
Employees State Insurance Corporation,
Guindy, Chennai-34. .. respondents

Petition filed under Article 226 of the Constitution of India, praying for issue of a writ of certiorari as stated within.

For petitioner: Mr.G.Rajan

For respondent: Mr.G.Devappan

: ORDER

The petitioner-concern praying to issue a writ of certiorari to call for the records of the first respondent made in his proceeding No. TN/INS-IV/51-51253-34, dated 10-12-1997 and quash the same, has filed this writ petition.

2.In the affidavit filed in support of the writ petition, the petitioner would submit that with intent to construct a small scale unit in 1986 in the field of manufacture of pharmaceutical products, the petitioner engaged four full workers/representatives to conduct market survey about the feasibility of sales and subsequently, engaged six to nine persons from June 1985 to May 1986 for the purpose of erecting the factory for manufacturing materials required for products, and on completion of the same in May 1986, in mid September 1986, it procured the raw materials and started the manufacturing process with newly appointed expert staff; that the Employees' State Insurance Corporation Inspector visited the factory on 19-9-1990 and perused the records and directed to pay the contribution from June 1987

onwards, since according to the Inspector, the factory had employed ten employees, and therefore, the petitioner became liable to pay contribution under the Employees' State Insurance Corporation Act (hereinafter called the E.S.I. Act)

3.The petitioner would further state that it also started paying the contribution from June 1987 up-to-date; that the E.S.I. Officer visited the premises and directed the petitioner to pay contribution from September 1986 onwards instead of June 1987; that the petitioner complied with that requirement; that while so, the Employees' State Insurance Corporation issued the assessment order dated 22-4-1997 calling upon the petitioner to submit the returns from June 1985 to May 1986 to pay the contribution; that the petitioner disputed the payment and sent a detailed representation dated 20-5-1997 on the ground that the manufacturing process was started for the first time only from September 1986 and therefore, the demand account sent from June 1985 to May 1986, is illegal, unjust and contrary to all canons of natural justice; that despite this explanation offered, the first respondent, in the impugned proceedings cited above, dated 10-12-1997, directed the recovery of such contribution from the petitioner-concern for a sum of Rs.9,237/- and further directed the petitioner to pay interest at the rate of 1.65 per day from 1-12-1997, that the petitioner-concern is aggrieved by the said impugned order of recovery, and hence, the writ petition.

4.In the counter affidavit filed by the respondents, it is stated that it is false to allege that the petitioner intended to start a factory in 1986, but, on the other hand, it was in May 1985 itself, that it had also been admitted by the petitioner that it engaged six to nine persons from June 1985 to May 1986, but,it is incorrect to state that they were engaged for erecting the factory, but only for the manufacture of materials required for the products, that further, there is no dispute about the fact that there were four field workers/ representatives in June 1985; that it might be that the factory attained its full-fledged scale in May 1986, but, since there was manufacturing process engaging more than ten employees coverable under the E.S.I. Act from June 1985, the petitioner-concern is liable to pay the contribution. On such rebuttal pleas, branding the allegations of the petitioner-concern as baseless and devoid of merits, the respondents would pray to dismiss the writ petition with costs.

5.During arguments, learned counsel appearing for the petitioner would submit that the petitioner-concern is manufacturing pharmaceutial products, that during 1986, the petitioner was the licencee from the State Drug Controller, but that was all for 1986; that from September 1986 onwards, the petitioner-concern started manufacturing products, that on 19-9-1990, the E.S.I Corporation officially inspected the factory premises and directed the petitioner to pay the contribution from June 1987 and it was paid; that again, the Inspector visited the premises and directed the petitioner to pay contribution from September 1986 onwards since the petitioner started manufacturing products from then and the said contribution was also paid, that thereafter, on 22-4-1997, the E.S.I Corporation issued impugned order for the period covering June 1985 to May 1986 to the tune of Rs.9,237/-, being the total amount of contribution with interest, that the petitioner commenced the manufacture of the products only from 1986 and hence it is not liable to pay the contribution, since there was no factory at all during 1985 and 1986 and that in spite of the reply, the Corporation issued the impugned notice, and

hence, the writ petition.
6.In reply, learned counsel appearing for the respondents submitting that the relevant period is in between June 1985 and May 1986, would mention Section 2(9) of the E.S.I. Act which defines the term ' employee' and would cite a judgement reported in REGIONAL DIRECTOR, E.S. I. CORPORATION, MADRAS VS. SOUTH INDIA FLOUR MILLS (P) LTD., (AIR 1986 SC 1686), wherein, in paragraph 6 of the judgement, it is held:
"6.It appears from the definition that three categories of persons as mentioned in clauses (i),(ii) and (iii) of Section 2(9) can be employees. We are, however, concerned with the category under clause (i) inasmuch as in all the cases before us the workers concerned were directly employed by the principal employers, namely, the respondent companies. Under category (i), in order to be an employee a person must be employed directly by the employer for wages in the factory or establishment on any work which should be incidental or preliminary to or connected with the work of the factory or establishment. The definition seems to be very wide and brings within the purview various types of employees. As soon as the conditions under the definition are fulfilled, one becomes an employee within the meaning of the definition."

On such arguments, learned counsel for the respondents would pray to dismiss the writ petition with costs.

7.In clarification, learned counsel appearing for the petitioner would further bring to the notice of this Court that interim stay was granted on 22-1-1998 in W.M.P.No.1027 of 1998 and that the petitioner had deposited the amount as per the subsequent order of this Court dated 28-7-1998, wherein, the said order of interim stay was made absolute on condition that the petitioner deposited the entire amount due within a period of twelve weeks from that date.
8.In consideration of the pleadings by parties, having regard to the materials placed on record and upon hearing learned counsel for both, what could be assessed in the case in hand is that the respondents have issued the impugned notice of demand, thereby, demanding the contribution under the relevant provisions of the E.S.I. Act for the disputed period in between June 1985 and May 1986 from the petitionerconcern, under not only the impugned demand notice, but also on earlier occasions, when demand was made for different other periods, they did so in a delayed manner and in the case of the impugned notice, they have issued the same after seven years. Though the delay appears to be longer, still, since there is no limitation for such recoveries to be made under law, especially, under the provisions of the E.S.I. Act, 1948, such argument cannot hold water, and therefore, no order could be passed by this Court so far as the petitioner's plea based on the

delayed demand is concerned.
9.The period in dispute is between June 1985 and May 1986. The claim of the petitioner is that during the said period, the petitionerconcern was only making preparations putting up constructions for the factory and had not at all started production which was from September 1986 and therefore, the demand on such contribution cannot be made during that period of construction of the factory.
10.Contradictory arguments would be put forth on the part of learned counsel for the respondents to the effect that the contribution period covers the construction period also and would cite the definition of "employee" under Section 2(9) of the E.S.I. Act for clarification as to who is the "employee" and when once the employee is engaged in the construction work, he would fall under the purview of this Section automatically and the petitioner would become liable to contribute for the said construction period also, and hence, it is necessary to extract Section 2(9) of the E.S.I. Act, 1948, which reads:-
"Section 2(9): "employee" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and--
(i)who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment whether such work is done by the employee in the factory or establishment or elsewhere; or
(ii)who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or
(iii)whose services are temporarily lent or let on hire to the principal employer by the person with whom services are so lent or let on hire has entered into a contract of service;
and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the distribution or sale of the products of, the factory or establishment or any person engaged under the Apprentices Act, 1961 or under the standing orders of the establishment; but does not include--

(a)any member of the Indian naval,
military or air forces; or
(b)any person so employed whose wages
(excluding remuneration for overtime
work) exceed such wages as may be
prescribed by the Central Government:

Provided that an employee whose wages
(excluding remuneration for overtime works) exceed such
wages as may be prescribed by the Central
Government at any time after (and not before) the
beginning of the contribution period, shall
continue to be an employee until the end of that
period."

11.On a plain reading of the definition of "employee" under Section 2(9) of the E.S.I. Act, it comes to be known that the Section is exhaustive so as to cover any person employed for wages in connection with the work of a factory or establishment, whether directly employed or through an immediate employer of work, it is ordinarily part of the work of the factory or establishment. It is in more clear terms given under Section 2(9)(ii) of the E.S.I. Act that it is not only part of the work of the factory or establishment, but also which is preliminary to the work carried out or incidental to the purpose of the factory or establishment or even for the construction work of a factory, if any person is employed for wages, he would fall within the definition of Section 2(9) of the E.S.I. Act, and further, since this does not fall under any of the exceptions given under Section 2(9)(iii)(a) or (b) or in the proviso thereunder, no doubt need be entertained in treating the construction workers of a factory being the employees within the import and meaning of the definition Section 2(9) of the E.S.I. Act, and therefore, it has to be be held that since the construction workers employed by the petitioner-concern for erection of the factory being employees, the petitioner-concern is liable to contribute the Employees' State Insurance contribution for them covering the period given in the impugned notice, i.e. June 1985 to May 1986.

12.Even the Apex Court in the judgement reported in A.I.R. 1986 S.C. 1686 (cited supra) has made it clear giving expression to Section 2(9) of the E.S.I. Act to the effect that the the employees used for the construction work of the factory are 'employees' within the meaning of the Section. While such being the position, either on the limitation question or on the plea that the petitioner engaged employees only temporarily for the construction of the factory, for whom, the contribution could not be demanded nor collected by the respondents, is falsified and the same cannot sustain in law.

13.For all the above discussion held, the only conclusion that could be arrived at is to confirm that the demand notice impugned herein is perfectly in order and the interference of this Court sought to be made into the same is not only unnecessary but unwarranted as well.

14.In result, the above writ petition does not merit acceptance, and the same is dismissed as such. No costs.

5-2-2002
Index: Yes/no
Internet: Yes
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V.KANAGARAJ,J.

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